

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's)	
Own Motion, directing Pine River)	
Cable to show cause why it should)	Case No. U-16181
not be found in violation of the Uniform)	
Video Services Local Franchise Act,)	
<u>2006 PA 480, MCL 484.3301 et seq.</u>)	

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on July 22, 2010.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before August 12, 2010, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before August 26, 2010. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for

Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L. Feldman
Administrative Law Judge

July 22, 2010
Lansing, Michigan
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PROPOSAL FOR DECISION

I.

PROCEDURAL HISTORY

This case was initiated by the Commission's January 11, 2010 show cause order directing Pine River Cable Company (Pine River Cable) to show cause why it should not be found in violation of the Uniform Video Services Local Franchise Act, 2006 PA 480, as amended by 2009 PA 4, MCL 484.3301.3301 *et seq.* The order indicated that Staff had received complaints from nine customers and the Village of Marion, and identified concerns with Pine River Cable's operation in six communities, including the Village of Perrinton, Fulton Township, McBain City, the Village of Maple Rapids, Carson City as well as the Village of Marion. The order thus provided:

Based on customer complaints, as well as information gained by the Staff contacting communities in which Pine River was operating, the Staff has the following concerns regarding potential violations of the Act:

- That Pine River may be in violation of MCL 484.3302(2) due to its alleged failure to enter into

Uniform Video Services Local Franchise
Agreements before operating video service in
Michigan

- That Pine River may be in violation of MCL 484.3303(1) to MCL 484.3303(6) for allegedly failing to enter into Uniform Video Service Local Franchise Agreements and by allegedly failing to provide notice to local communities of any changes that may be occurring.
- That Pine River may be in violation of MCL 484.3306(1) which pertains to the designation and payment of franchise fees.
- That Pine River may be in violation of MCL 484.3310, which pertains to customer protections and dispute resolution procedures.
- That Pine River may be in violation of MCL 484.3310(5)(a), which requires a provider to respond to an informal customer complaint in 10 days.

Therefore, the Commission finds that it should order Pine River to show cause why it should not be found in violation of the above-described provisions of the Act.

The Commission directed Pine River Cable to file a response by February 12, 2010, to explain in the response whether it entered into franchise agreements as required by the act, and to provide copies to Staff of any such agreements by February 26, 2010. The Commission also set March 9, 2010 as the date for the prehearing conference. The Commission's order directed Pine River Cable to appear with counsel at the prehearing.

The docket reflects that the Commission's order was served on Pine River Cable. The docket also reflects that on February 5, 2010, the Executive Secretary's office

mailed notice of the proceeding to various communities and entities as shown on the filed proof of service.

Pine River Cable did not provide the response called for in the Commission's order. A letter signed only "Pine River Cable", with no contact information, was received by the Commission on February 16, 2010. The letter stated:

Pine River Cable is no longer doing business and has not been conducting business for months. As for the complaints, Pine River Cable was assigned all the franchises when it purchased each system from PC-1 Cable (a New Jersey corporation) and was operating in these communities under such franchises. Each community was given written notice in addition to a 24/7 message on their TV listing channel that Pine River Cable would no longer be offering services to any community in the state of Michigan or any other state.

Pine River Cable is no longer conducting business in any community in Michigan or any other state. It no longer has an address or phone number.

At the prehearing conference held in accordance with the notice, Pine River Cable did not appear represented by counsel as directed in the Commission's order. John Metzler, who indicated on the record that he was a shareholder of the company, attended the hearing, and further indicated it was he who sent the unsigned letter. Mr. Metzler, not an attorney, could not represent Pine River Cable in the contested case, but agreed to cooperate with Staff.

Following the schedule established at the prehearing conference, on April 20, 2010, Staff filed testimony of Ryan McAnany, Video Franchise Specialist for the Commission. At the scheduled evidentiary hearing, on May 17, 2010, Mr. McAnany testified and his Exhibits S-1 and S-2 were admitted into evidence. Staff also asked for

the opportunity to file a written brief with its recommendations in this matter, which it filed on June 1, 2010.

On the basis of Mr. McAnany's testimony, Staff now asks that the Commission find Pine River Cable in violation of the Uniform Video Services Franchise Act, and exercise its authority under MCL 484.3314 to impose appropriate penalties and remedies.

The record evidence and the Staff's recommendations are discussed below.

II.

DISCUSSION

The Uniform Video Services Franchise Act, 2006 PA 480, became effective January 1, 2007, with the amendments adopted by 2009 PA 4 taking effect April 2, 2009. Mr. McAnany explained the basic requirements of the Act.¹

A key requirement is that video services providers obtain a franchise from each local unit of government or "franchising entity" before providing service within that community.² The Act directs the Commission to establish a form for the franchise agreement, consistent with the provisions of the Act.³ The Commission established this form in its January 30, 2007 order in Case No. U-15169.

The Act specifies a process for providers to obtain a franchise, with time requirements provided to facilitate expeditious completion of franchise agreements. In

¹ Mr. McAnany's testimony is transcribed at Tr 13-29.

² See MCL 484.3302(2) and 484.3303(1).

³ See MCL 484.3302(1) and 484.3303.

the event a franchising entity fails to respond timely to a request for an agreement, the franchise agreement is considered approved. The instructions for the uniform video services local franchise agreement direct providers to complete Attachment 3 to the franchise agreement to notify both the franchising entity and the Commission of this approval.⁴

Another key requirement is that video service providers must notify the franchising entity in order to terminate the franchise agreement, to modify the video service area footprint, or to change any of the information in the franchise agreement.⁵ Attachment 2 of the uniform video services local franchise agreement provides a form for providers to indicate such changes.

Additionally, the Act as amended provides a detailed dispute resolution process for customer complaints. Once complaints reach the Commission, the Commission is directed to attempt informal resolution of the complaint, and a provider is required to respond to a complaint forwarded by the Commission within 10 days.⁶

Mr. McAnany testified that the Commission maintains a webpage for video service providers that contains all this information, including the franchise agreement and instructions.

Mr. McAnany described events leading up to the issuance of the show cause order. He testified that Pine River Cable had self-identified itself to the Commission as a video services provider subject to the Act. On September 1, 2009, Staff became

⁴ The form was revised slightly by the Commission's April 16, 2009 order in the same docket to reflect amendments to the Act under 2009 PA 4, effective April 2, 2009.

⁵ See MCL 484.3303(5) and (6).

⁶ See MCL 484.3310(5) (a).

aware of a lawsuit filed by DirecTV against Phoenix Communications, d/b/a Pine River Cable, alleging unauthorized use of programming. The Director of the Telecommunications Division for the MPSC, Ms. Robin Ancona, set a letter to Pine River Cable seeking an explanation, and received no response. This was also followed up by Mr. McAnany's unsuccessful efforts to reach Mr. Metzler by phone and email in November 2010.

Also in October 2010, Staff began to receive complaints from customers related to loss of service and failure to make refunds. Staff followed the dispute resolution procedures using the email contact information on file, but did not receive a response. Exhibit S-1 shows that seven customer complaints were forwarded to the company between October 22, 2009 and December 23, 2009 and no responses were received. An eighth complaint was not forwarded, due to the lack of response on the other complaints. Staff also started receiving complaints from franchising entities that the company was operating without a franchise agreement, failing to pay fees, and failing to notify them of the termination of service. In further investigation, Staff began contacting other franchising entities as well.

Mr. McAnany also recounted events following the Commission's show cause order. He confirmed that the company had not filed the response called for in the Commission's order, and noted that Mr. Metzler had acknowledged sending the unsigned letter indicating the company was no longer in business. He reviewed his attempt to get additional information from Mr. Metzler following the prehearing conference. The correspondence is included in Exhibit S-2.

In Exhibit S-2, Mr. Metzler provided the following information for each of the six communities identified in the Commission order:

Village of Perrinton

The customers were notified 30 days prior to the shut down of service by mail. The franchise agreement was assigned to Pine River Cable from PC-1.

Fulton Township

The customers were notified 30 days prior to the shut down of service by mail. The franchise agreement was assigned to Pine River Cable from PC-1.

City of McBain

Pine River Cable used Tru Media Corp to contact every customer as well as using at [sic] 24/7 message on one of the cable channels for the customer to read prior to shut down.

The franchise agreement was assigned to Pine River Cable by PC-1.

Village of Maple Rapids

Pine River Cable was working with the village to obtain a new franchise agreement. The existing franchise that was assigned from PC-1 to Pine River Cable was valid through 2012.

The existing franchise did not have franchise fees listed.

Customers were notified 30 days prior to shut down by mail and phone calls.

Carson City

The franchise agreement was assigned to Pine River Cable from PC-1.

The city was paid \$400.00 a month but the franchise did not stipulate a fee. Tru Media Corp. was used to notify all customers prior to shut down.

Pine River Cable does not have any equipment in the Carson City area, including the hospital that doesn't require a franchise.

Village of Marion

The franchise agreement was assigned to Pine River Cable from PC-1 stated the fees to be paid annually on February 1 of each year. The village was paid through 2008 but did not receive February 2009 payment.

Mr. McAnany testified that Mr. Metzler had agreed to provide additional information to Staff, but did not provide anything beyond the email included in Exhibit S-2. No additional documentation was provided. Mr. McAnany further testified that Commission records indicate the Pine River Cable had over 1,000 customers.

Staff's brief argues that the record evidence demonstrates that Pine River Cable has violated provisions of the Act, including MCL 484.3302(2) and 484.3303(3), requiring franchise agreements, MCL 484.3303(5) and (6), requiring notices of termination, and MCL 484.3310(5)(a), requiring responses to customer complaints within 10 days. Staff seeks fines under MCL 484.3314(1)(b) of \$500 each for each of 14 identified violations, and seeks other relief. While the Commission's order also identified potential violations of MCL 484.3306, requiring the payment of fees, Staff's brief indicates that it finds the record evidence inconclusive, and is not seeking any relief related to violations of this section.

Findings regarding the specific violations identified by Staff are discussed in section A below; the penalty recommendations and other requested relief are discussed in section B.

A. Violations of the Uniform Video Services Local Franchise Act

1. Franchise Agreements

MCL 484.3302(2) provides:

Except as otherwise provided by this act, a person shall not provide video services in any local unit of government without first obtaining a uniform video services local franchise as provided under section 3.

Section 3 of the Act, MCL 484.3303, provides in pertinent part:

Before offering video services within the boundaries of a local unit of government the video provider shall enter into or possess a franchise agreement with the local unit of government as required by this act.

The Commission's show cause order clearly directed Pine River Cable to produce any franchise agreements existing with the six identified communities. As explained above, Pine River Cable did not produce any such agreements. While Mr. Metzler did advise Staff that Pine River Cable had obtained franchise agreements by assignment from a company it referred to as "PC-1 Cable" or "PC-1", it did not substantiate this claim with documents. Staff also clearly conducted an investigation seeking such documents. Staff had attempted to contact the company prior to the show cause order, and subsequent to the show cause order, attempted to work with Mr. Metzler to obtain the information.⁷

Based on this information, it is reasonable to conclude that Pine River Cable did not have valid franchise agreements in place within the six communities. It is also reasonable to conclude that Pine River Cable did have customers and was providing service in these communities. Mr. McAnany relied on information provided by Pine River Cable regarding its customers in response to a Commission survey in September

⁷ See, e.g. Exhibit S-2, page 2.

2009.⁸ Mr. Metzler's email confirms this for five of the communities, indicating customers in the Village of Perrinton, Fulton Township, the City of McBain, the Village of Maple Rapids and Carson City⁹ were notified prior to termination of service. As to the Village of Marion, Mr. Metzler's email indicates only that the village was paid franchise fees pursuant to a franchise agreement, but fees are determined based on revenues, which come from customers.

Staff also cites the termination and modification provisions of the Act. MCL 484.3303(5) and (6) provide as follows:

(5) The uniform video franchise agreement issued by a franchising entity may be terminated or the video service footprint may be modified, except as provided under section 9,¹⁰ by the provider by submitting notice to the franchising entity.

(6) If any of the information contained in the franchise agreement changes, the provider shall timely notify the franchising entity.

Staff's investigation, contacting communities prior to the show cause order, indicated that the franchising entities had not been informed of the termination of service. While Mr. Metzler indicated customers were informed, he did not claim that the franchising entities were informed of the termination. Since the statutory obligation to provide notice of changes, modifications and termination presume the existence of a valid franchise agreement, and since this PFD concludes that Pine River Cable did not have valid franchise agreements, it appears moot to consider whether Pine River Cable violated these provisions. Nonetheless, it is clear on this record that Pine River Cable

⁸ See Tr 27.

⁹ Mr. Metzler's email also indicates that Pine River Cable does not have equipment in Carson City, but it does not deny the company was providing video services to customers in that community, so it is difficult to attach any significance to this statement.

¹⁰ Section 9, MCL 484.3309, requires service to be provided in a nondiscriminatory manner.

did not notify the six communities of its intent to terminate service within the communities.

Thus, this PFD finds that Pine River Cable did not have valid franchise agreements as required by MCL 484.3302(2) and 484.3303(1) in the six communities, and further, if Pine River Cable did have a valid franchise agreement in any of these communities, it failed to notify the communities of changes to the agreement as required by MCL 484.3303(5) and (6).

2. Dispute Resolution

MCL 484.3310(5) provides in part:

A complaint filed [with the Commission] involving a dispute between a customer and a provider shall be handled by the commission in the following manner:

(a) An attempt to resolve the dispute shall first be made through an informal resolution process. Upon receiving a complaint, the commission shall forward the complaint to the provider and attempt to informally mediate a resolution. **The provider shall have 10 business days to respond and offer a resolution.** If the dispute cannot be resolved through the informal process, the customer can file a formal complaint under subdivision (b). [Emphasis added].

A clear requirement of this section is that a provider respond to a complaint forwarded by the Commission within 10 days. Mr. McAnany's testimony is clear that the Staff provided notice to Pine River Cable of seven of the eight complaints listed in Exhibit S-1. Staff's reluctance to forward the eighth complaint is understandable, but since the company had no opportunity to respond to this eighth complaint, it did not technically violate 483.3310(5)(a). This PFD thus finds that Pine River Cable failed to respond within 10 days to seven complaints transmitted by the Commission, in violation of MCL 484.3310(5)(a).

B. Relief

MCL 484.3314 gives the Commission authority to order remedies and penalties for violations of the Act, as follows:

(1) After notice and hearing, if the commission finds that a person has violated this act, the commission shall order remedies and penalties to protect and make whole persons who have suffered damages as a result of the violation, including, but not limited to, 1 or more of the following:

(a) Except as otherwise provided under subdivision (b), order the person to pay a find for the first offense of not less than \$1,000.00 or more than \$20,000.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$2,000.00 or more than 440,000.00.

(b) If the video service provider has less than 250,000 telecommunication access lines in this state, order the person to pay a fine for the first offense of not less than \$200.00 or more than \$500.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$500.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$500.00 or more than \$1,000.00.

(c) If the person has received a uniform video service local franchise, revoke the franchise.

(d) Issue cease and desist orders.

Subsection (2) of section 14, MCL 484.3314(2), provides an exception to the fine provisions for an “unintentional and bona fide error”. The fines requested by Staff are discussed in subsection 1 below; the other relief is discussed in subsection 2.

1. Fines

Staff seeks fines totaling \$7,000 for what it counts as 14 violations of the Act. Reasonably consolidating violations of MCL 484.3302(2) and 3303(1) with violations of MCL 484.3303(5) and (6), Staff identifies six violations attributable to the company’s failure to have valid franchises and to notify local communities of the termination of

service. Staff also seeks a penalty for what it counts as eight violations of section 10(5)(a) of the Act, MCL 484.3310(5)(a), based on the company's failure to respond within 10 days to notification of a customer complaint.

Staff recommends a penalty of \$500 for each violation, recognizing that the company had approximately 1000 customers and thus falls within MCL 484.3314(1)(b). As explained above, this PFD concludes that Pine River Cable violated MCL 484.3302(2) and 484.3303(1) by failing to have valid franchise agreements in place, and further that if any such franchise agreements were in place, Pine River Cable violated MCL 484.3303(5) and (6) by failing to notify the franchising entities of termination of service. As Staff recommends, this should be considered six violations of the Act. This PFD also concludes that the seven complaints that were actually sent to Pine River, with no response, provide the basis for a finding of seven violations, rather than eight.

For these reasons, this PFD recommends that the Commission assess penalties for 13 violations of the Act. Using Staff's recommended penalty of \$500 per violation, which is consistent with the provisions of section 14, MCL 484.3314(1)(b), this PFD recommends the Commission assess penalties of \$6,500 against Pine River Cable.

2. Other Relief

Staff also seeks other relief, including a cease and desist order, revocation of any existing franchises, and relief barring Mr. Metzler from operating another cable company in Michigan.

As to the request for a cease and desist order and a revocation of any existing franchises, this PFD finds that Staff's recommendations are reasonable and expressly

within the authority granted to the Commission under section 14 of the Act. As explained above, this PFD finds that Pine River Cable does not have valid franchises for the six communities identified in the Commission's show cause order. Mr. Metzler has also indicated Pine River Cable is no longer providing service in these communities. Therefore, this PFD recommends that any franchises Pine River has in the identified communities be expressly revoked under MCL 484.3314(1)(c).

Turning to the requested cease and desist order, since this PFD finds that Pine River Cable has violated the Act, since Pine River Cable has not resolved outstanding customer complaints related to its discontinuance of service, and since Mr. Metzler indicated Pine River Cable has no intention of operating further in Michigan, this PFD recommends that the Commission issue a cease and desist order directing Pine River Cable to cease and desist from providing video services in Michigan, as authorized in section 14(1)(d) of the Act.

Staff also requests that the Commission bar Mr. Metzler from operating a video service provider in Michigan. Debarment of owners or operators of video service providers is not one of the remedies or penalties expressly identified in section 14. While the remedies and penalties listed in section 14 are not intended to be exclusive, a lifetime bar is an extreme remedy. In this case, the bar would be directed to an individual whose culpability has not directly been adjudicated on this record, and who was not notified in advance that debarment would be sought. Staff has not presented any analysis of the Commission's authority to order this relief under the Act, or under the circumstances presented in this case. Therefore, this PFD does not recommend that the Commission grant Staff's request.

Instead, this PFD recommends that the Commission seek the assistance of the Michigan Attorney General to determine whether the owners or operators of Pine River Cable can be held legally responsible for any fines assessed against Pine River Cable, and any amounts owed to customers.

Also, since Pine River's customers were injured by Pine River's unlawful operation and subsequent termination of service, this PFD also recommends that the Commission direct Pine River to repay any customers who prepaid for services not received. This additional relief to remedy the damages caused by Pine River's violation of the Act is authorized by the general language of section 14, which directs the Commission to order remedies and penalties to protect and make whole persons who have suffered damages as a result of a violation of the Act.

III.

CONCLUSION

For the reasons set forth above, this PFD concludes that Pine River Cable was providing video services in violation of sections 2, 3 and 10 of the Uniform Video Services Local Franchise Act. This PFD recommends that the Commission assess a

fine of \$500 for each of 13 violations of the Act as explained above, for a total fine of \$6500, order Pine River Cable to cease and desist from further operations in Michigan, and provide that any existing franchise agreements are rescinded.

STATE OFFICE OF ADMINISTRATIVE
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For the Michigan Public Service Commission

Sharon L. Feldman
Administrative Law Judge

Issued and Served: July 22, 2010